

**DISSENTING VIEWS
OF
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DIANA DeGETTE, BART STUPAK, ANNA G. ESHOO, HILDA L. SOLIS,
THOMAS H. ALLEN, ELIOT L. ENGEL, FRANK PALLONE, JR.,
AND JANICE D. SCHAKOWSKY**

We strongly oppose H.R. 4167, the "National Uniformity for Food Act of 2005," for both procedural and substantive reasons. This legislation has far-reaching implications for our nation's food safety. In the 108th Congress, the predecessor to this legislation (H.R. 2699) was reported by the Committee without the benefit of any Subcommittee hearings or markups, without full Committee hearings, and without any Committee effort to develop a factual record to support this legislation. Again in this Congress, this legislation was reported by the Committee without benefit of hearings, Subcommittee consideration, or factual record. In letters to this Committee, dozens of groups, including governmental and public health and environmental groups, have expressed their strong opposition to this legislation. These groups, however, have never been given an opportunity to provide testimony to this Committee. In short, the Committee has taken none of the expected and required action to develop sound policy and defensible legislative language.

As a result, H.R. 4167 is substantively deeply flawed. This bill, which has been touted as improving the safety of our nation's food supply, will have precisely the opposite effect. It would eliminate almost every state and local law that provides greater consumer protection than our limited federal food safety laws. Its effect is not to raise the level of protection from unsafe food, but to protect the food industry from strong state consumer protection laws. Food safety is simply not an appropriate target for federal preemption. Unlike drugs and medical devices, which are primarily regulated by the federal government, states are the primary guardians of food safety. Food safety is not pervasively regulated at the federal level. State and local governments conduct fully 80 percent of food safety inspections. The FDA relies heavily on the states to carry out food safety activities under state laws, and even to ensure the safety of imported foods.

Despite the predominant role played by the states and local governments in protecting Americans from unsafe food, the bill recklessly eliminates the great bulk of state and local food safety laws. H.R. 4167 is a sweeping law with potentially disastrous consequences for the safety of the American food supply. State food safety officials have repeatedly warned that the bill would disrupt the day-to-day enforcement activities of state and local governments and jeopardize their ability to protect their citizens from unsafe foods. State and local governments whose laws are preempted will not even be able to warn their citizens about the presence of poisonous contaminants in local food. This will leave consumers with only the most limited federal protection from unsafe foods until the effects of this bill have been worked out. That is likely to be a lengthy period, because this complex, ambiguous bill will be extensively litigated in the courts, and it could take years for state legislatures to laboriously reenact all of their laws that help consumers avoid unsafe food.

State officials have repeatedly warned that this bill will paralyze the states' ability to respond to terrorist threats to the food supply because it will dismantle the state and local laws that represent our first line of defense against a food-borne bioterrorism attack. The Association of Food and Drug Officials recently cautioned that this legislation would "handcuff" the first responders who deal with food terrorism threats. The National Association of State Departments of Agriculture said in a letter to this Committee, that our current food safety system "forms the first line of defense against the growing threat of a terrorist attack against our nation's food supply" and cautions that preempting state and local food safety programs would leave a "critical gap in the safety net that protects consumers."

It has been suggested that the imminent hazard authority in the bill would allow states and local governments to address emergencies. In fact, the imminent hazard authority in the bill is burdensome and impractical. Having already swept aside all state and local laws that are not identical to federal law, the imminent hazard provision then requires the state facing an emergency to first enact a requirement (i.e., pass a law) that would address the problem, notify the federal government about the situation and then make a determination about whether the federal government is going to act on the threat. This is an unrealistic approach for addressing a true emergency.

If a state, for instance, believed that a particular warehouse or truck contained contaminated food, the new regulatory requirements under H.R. 4167 would make it extraordinarily difficult for the state to respond effectively. To take advantage of the imminent hazard authority, the state would have to first pass a law to address the contamination (its existing law would have been repealed by the bill, unless it was identical to federal law), notify the federal government about the situation, and then wait to see if the federal government wanted to act. By the time these steps had been taken, the contaminated food could be dispersed through commerce. This is hardly a practical answer to a suspected bioterrorist threat or other emergency. This puts aside the important threshold question of whether a state might even be prevented from learning of an imminent hazard once many of its key safety laws were preempted. Because testimony was never heard on these provisions, it is unclear how the authors of the bill anticipate these provisions to work.

Additionally, imminent hazard authority is only available if the threat is likely to result in serious adverse health consequences or death. This is a very high standard to meet in ordinary food safety situations, where, for example, food contamination is suspected but not confirmed. The imminent hazard authority is simply not an answer to most food safety problems a state or local government encounters every day.

The preemption of existing warnings about the safety of specific foods and non-identical laws would also trample states' rights by preempting many state laws that are designed to protect their citizens against problems particular to their food supplies. During the markup, it was clear that the Committee had not conducted any survey to determine the number and type of state laws that would be invalidated by the bill. But there is no doubt many state laws would be preempted.

For example, the bill would prevent a state from requiring a warning label on fish that may contain mercury advising women who may become pregnant, pregnant women, nursing mothers, and young children of the link between mercury and its potential to harm an unborn baby or young child's developing nervous system. Alaska's state laws requiring labeling of farm-raised salmon, halibut, or sablefish products and requiring labeling of genetically modified fish or fish products would also be preempted. Additionally, the bill would invalidate a Michigan law requiring a warning when any sulfiting agent is present in any bulk food to advise consumers about the risk of possible allergic reaction.

The proponents of the bill concede that one of its primary purposes is to preempt a specific California law, known as Proposition 65. Proposition 65 requires warnings on food if the food contains chemicals known to cause cancer or birth defects at levels which cause significant risk. While Proposition 65 has resulted in some warnings, it has more importantly created a market incentive to remove dangerous chemicals from foods and to bring safe foods to market. The California Attorney General reports that Proposition 65 has been a useful supplement to federal standards.

The proponents of this bill have offered no justification for the elimination of these consumer protection laws, nor pointed to any unreasonable burden to which they have been subjected as a result of these laws. The implications of this bill are vast, yet no hearings have ever been held on H.R. 4167, and certainly no examination of the consequences of the bill since the escalation of the bioterrorist threat.

In addition to the numerous substantive flaws in this legislation, H.R. 4167 also contains significant drafting errors. At the markup, Counsel indicated that the drafters' intent was to permit states to set their own tolerance and food safety standards in the absence of any such standard at the federal level. The current language of the bill, however, would prevent states from acting, even if the FDA has never acted to set a tolerance or food safety standard.

We owe it to the American people to consider carefully the consequences of such a radical overhaul of food safety laws. In two consecutive Congresses, this Committee has refused to hold hearings on the bill or try to reach any consensus on an issue that affects millions of American families.

While no list of supporters has been provided, numerous groups have taken a position strongly opposing H.R. 4167. Opposition came from a wide range of groups, including the Association of Food and Drug Officials, the National Association of State Departments of Agriculture, the Attorney General of California, the National Conference of State Legislatures, and Wisconsin's Department of Agriculture, Trade and Consumer Protection. Even the Texas Department of State Health Services has expressed its strong concerns with the bill. Many consumer and environmental groups also oppose this legislation, including the Center for Science in the Public Interest, the League of Conservation Voters, Environmental Defense, Natural Resources Defense Council, National Environmental Trust, and the US Public Interest Research Group. Many California groups are also opposed, including California Communities

Against Toxics, the California League of Conservation Voters, the California League for Environmental Enforcement Now, California for Alternatives to Toxics, Communities for a Better Environment, the Ecological Rights Foundation, the Environmental Law Foundation, the Environmental Working Group/EWG Action Fund, the Mateel Environmental Law Foundation, and the Sierra Club—California.

For all of these reasons, we strongly oppose H.R. 4167.


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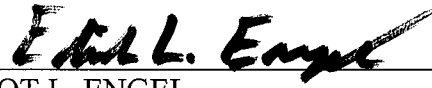

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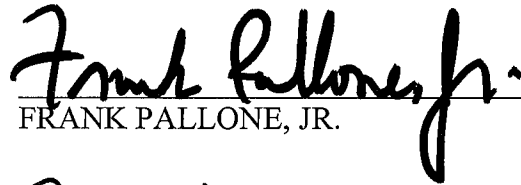

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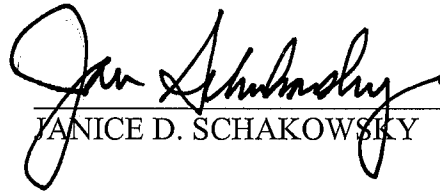

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